Filed 6/28/19 P. v. Forbes CA1/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DONAL JAMES FORBES, Defendant and Appellant.	A152403 (Napa County Super. Ct. Nos. CR183134, CR182368)

Donal James Forbes appeals his conviction on 13 counts arising from an incident in which he took without permission a truck belonging to his father and, when confronted by a police officer the next day, recklessly drove the truck in an attempt to escape and then resisted arrest. His resistance led to a violent melee in which two police officers were injured, one by a bite from a police dog. He asserts numerous errors with respect to the seven counts of resisting officers on which he was convicted but does not challenge his conviction for six driving-related offenses. Except for one minor modification of his seven-year prison sentence, we shall affirm the judgment.

Factual and Procedural History

On April 28, 2017, defendant's father, Donal Forbes, Sr., gave defendant a ride in his truck. That night, Forbes, Sr., noticed that the truck was missing and called the Napa Police Department. He told an officer that defendant may have taken the truck and then told defendant's girlfriend that he had reported the truck stolen.

The next day, Napa Police Officer Marcus Martinez responded to a call from defendant's girlfriend reporting defendant as an "unwanted" presence at her home. As

Martinez arrived, he saw defendant in the driver's seat of his father's truck. Martinez activated his lights and chirped his siren, parked perpendicular to the truck, and exited his patrol car. Defendant looked at Martinez, hit the gas pedal, and rammed the rear passenger bumper of the patrol car, moving the car toward Martinez. Martinez moved out of the way and yelled "stop," but defendant drove away.

Martinez gave chase. Defendant drove at up to 65 miles per hour through city streets, ignoring stop signs, nearly hitting pedestrians, and side-swiping a parked truck. He eventually rolled up an embankment, jumped from the truck, and ran into a field.

Officer Jeffery Jacques drove to the area and saw defendant crossing a street; defendant ran and tried to climb over a fence. Jacques drew his gun and ordered defendant to the ground. Defendant did not comply, but did fall off the fence. Aiming his gun at defendant, Jacques again ordered him to the ground, but defendant walked toward Jacques mumbling and saying, "fuck you." Based on a later blood test, defendant's blood alcohol content at this time was about .127 percent.

Plainclothes officer Curtis Madrigal arrived and saw defendant making motions that he construed as challenging Jacques to fight. Madrigal ran forward yelling "police" and "get on the ground!"; tackled the six-foot three-inch, 225-pound defendant; and then tried unsuccessfully to control him, as defendant vigorously resisted. Officer Jacques joined "the wrestling match," trying to restrain defendant's arm with one hand while punching him repeatedly with the other. In doing so, Jacques broke a bone in his hand. Madrigal tried unsuccessfully to apply a carotid control hold.[1] Defendant continued struggling, and three more uniformed officers arrived and joined the fray. Finally, Deputy Jon Thompson arrived with a police dog ("Nash") trained to bite and hold. Seeing a "pile of officers" in a "moving fight," Thompson sent Nash into the pile, where he bit the non-uniformed Officer

[1] Such a hold involves putting an arm around the person's throat and applying pressure to each side of his neck to block the carotid arteries, which triggers unconsciousness by depriving the brain of blood without blocking the airway.

Madrigal in the buttock. Thompson pulled Nash off Madrigal, and several officers then managed to handcuff defendant.

Defendant was tried on 14 counts: (1) assaulting a peace officer (Martinez) with a deadly weapon (the truck) (Pen. Code, § 245, subd. (c)); (2) driving recklessly to evade police (Veh. Code, § 2800.2, subd. (a)); (3)–(4) causing serious injury while resisting a peace officer (one count for the injury to Jacques's hand and the other, count 4, for Madrigal's dog bite) (Pen. Code, § 148.10, subd. (a)); (5)–(9) forcibly resisting an executive officer (one count for each of five officers) (Pen. Code, § 69); (10) taking or driving a vehicle without its owner's consent (Veh. Code, § 10851, subd. (a)); and (11)–(14) four driving-related counts not at issue on appeal.[2]

The jury initially reached verdicts finding defendant not guilty on count one (assaulting Officer Martinez) and guilty on all other counts except the fourth, causing serious injury to Officer Madrigal (i.e., the dog bite). On that count, after the court answered a series of questions from the jury and permitted additional argument, as discussed below, the jury found defendant also guilty. The court sentenced defendant to seven years in prison,[3] and defendant timely appealed.

---

[2] The driving-related counts included hit-and-run driving (Veh. Code, § 20002, subd. (a)), driving with blood alcohol content of .08 or above (Veh. Code, § 23152, subd. (b)), driving under the influence (*ibid.*), and driving with a suspended license (Veh. Code, § 14601, subd. (a)). In his closing, defense counsel conceded defendant's guilt on all driving-based counts (i.e., two and ten–fourteen).

[3] Deeming count four the principal offense, the court sentenced defendant to the upper term of four years on that count; to consecutive sentences of one-third the middle term on counts two (eight months), three (one year), and seven (eight months); and to concurrent terms of two years each on counts eight through ten. The court stayed sentence under Penal Code section 654 on counts five and six, imposed a concurrent 30-day sentence on count 12, stayed sentence on count 13, and dismissed count 14. Finally, finding that defendant had violated probation in the case based on the February 2017 incident (see discussion in section 1, *post*), the court sentenced him to eight months in prison in that case, consecutive to the sentence in this case.

Discussion

1. *The trial court did not abuse its discretion in admitting prior-crimes evidence*

Defendant first contends that the court erred in admitting evidence of two prior incidents in which he had resisted arrest. The court granted the prosecutor's in limine motion for leave to offer evidence of offenses committed in 2015 and 2017. The proffer described a 2015 incident in which Napa police officers conducting an investigation went to the home of defendant's girlfriend. Defendant, who was subject to a warrant, fled out a window. An officer chased him yelling "Police, stop!," but defendant hurdled a fence and eluded the officer. He ran by a second officer, ignoring commands to stop, before a third officer caught him.

The proffer described a February 2017 incident as follows: "Officer Jacques tried to contact [defendant] following a report of a potentially intoxicated subject. [Defendant] repeatedly ignored Officer Jacques's commands to stop walking. Officer Jacques then tried to grab defendant's arm, and defendant pulled his arm away. Once [defendant] saw other officers approaching with lights and sirens he began running away from Officer Jacques[, who] ran after him and continued to order him to stop. [Defendant] went over a fence and [into] a backyard. Officer Martinez and [another officer] contacted [defendant] in the backyard[, but defendant] ignored their commands. [Defendant] then took an aggressive stance to face Officer Martinez[, who] grabbed defendant's arm and tried to turn defendant's body around and bring [him] to the ground. Once Officer Martinez [did so], [defendant] physically resisted him by placing his hands under his stomach and then pull[ing] his arms away . . . . [Defendant] continued to . . . struggle until [officers] were able to [handcuff] him." At the hearing, the prosecutor added that a K-9 unit had responded to the 2017 incident.

Evidence was received consistent with both proffers. While character evidence is generally inadmissible to prove conduct on a later occasion (Evid. Code, § 1101, subd. (a)), evidence that a person previously committed a crime is admissible when relevant to prove certain facts, such as intent or motive. (*Id.*, subd. (b).) " 'The trial court

judge has the discretion to admit [prior crimes] evidence after weighing the probative value against the prejudicial effect.' " (*People v. Fuiava* (2012) 53 Cal.4th 662, 667.) We review such rulings for an abuse of discretion. (*Ibid.*)

The trial court considered that "these assaults on police officer/resisting or obstructing peace officer charges [have] a ton of elements that have to do with intent and knowledge" and admitted the evidence as relevant to "motive, intent, knowledge," finding that its probative value "clearly outweighs" any prejudice. The court also took judicial notice of defendant's conviction for the February 2017 incident. The court instructed the jury that it could consider the past offenses, if proven, for purposes of deciding whether defendant "acted with the intent to evade the officers in this case; or [¶] . . . had a motive to commit the offenses alleged in this case; or [¶] . . . knew that he was dealing with a police officer performing his duty when he allegedly acted in this case; or [¶] [did not act as] the result of mistake or accident."

Defendant contends that the court erred in admitting the evidence to prove intent with respect to the resistance and assault charges (counts one and three through nine), because these offenses (violations of Penal Code sections 69 and 148.10) are general-intent crimes, as to which prior-offense evidence is not admissible to prove intent. (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1019.) While conceding that point, the Attorney General responds that evidence of the prior conduct was admissible to prove defendant's specific intent to evade police under count two, reckless driving to evade police. (Veh. Code, § 2800.2; CALCRIM No. 2181.) Defendant replies that the instruction did not limit consideration of the evidence to count two, and the jury "would not have understood the word 'evade' to be a term of art referring solely to count two." However, defendant made no request that the court limit the instruction to count two, the only count as to which the term was relevant. The instruction on count two required proof that defendant "willfully fled from, or tried to elude, the officer, *intending to evade* the officer" (italics added), while no other instruction mentions "intent to evade." Nor was the term "evade" likely to be construed to encompass resistance, as defendant suggests.

The Attorney General also correctly argues that the prior conduct was relevant to defendant's motive, tending to show that defendant was not merely attempting to escape when he rammed the truck into the rear of the police car, but intended to assault Officer Martinez, as alleged in count one. Officer Martinez was involved in the February 2017 arrest that led to defendant's prior conviction, which fact, the prosecutor argued, gave defendant a retaliatory motive to strike the officer. Defendant contends that "nothing specific in the events . . . suggested that [he] had any particularized animus toward the specific officers involved" in the February 2017 arrest, and that a revenge theory was "undercut" by the fact that he had a similar prior that did not involve the same officers. But a lack of other evidence to bolster a revenge theory does not negate the probative value of the disputed evidence; if anything, it increased the importance of that evidence. (See *People v. Schader* (1969) 71 Cal.2d 761, 774 [listing "necessity" among "chief elements of probative value"].)

Because the prior incidents had some relevance to prove that defendant intended to strike Officer Martinez under count one and to evade officers under count two, we need not consider whether that evidence was necessary or appropriate for the other purposes the court identified—that is, to show that defendant knew that the people he was resisting were police officers and that he did not act out of mistake or accident. In all events, the court acted within its discretion in ruling that the prejudicial effect of the other-crimes evidence did not substantially outweigh its probative value. Defendant's past conduct was unlikely to prove prejudicial, as it was no more egregious than the charged conduct. (*People v. Cowan* (2010) 50 Cal.4th 401, 475 ["Evidence is prejudicial within the meaning of Evidence Code section 352 if it ' "uniquely tends to evoke an emotional bias against a party as an individual" ' [citations] or …would cause the jury to ' " 'prejudg[e]' a person or cause on the basis of extraneous factors." ' "].) The court instructed the jury "not to consider the evidence to prove that defendant was a person of bad character, thereby 'minimizing the potential for improper use.' " (*People v. Foster* (2010) 50 Cal.4th 1301, 1332.) The court did not err in admitting evidence of the prior offenses.

2. *The court did not commit prejudicial error in its answers to jury questions*

Defendant contends that the court erred in responding to the jury's requests to clarify the instructions on count four, causing serious injury while resisting a peace officer (§ 148.10) based on the police dog having bitten Officer Madrigal during the "moving fight" to restrain defendant. The jury was obviously struggling with whether defendant could be found to have caused the dog bite. Although the court's responses did not explain as fully as they might have the concept of supervening causation, the instructions nonetheless correctly articulated what the jury was required to find in order to convict defendant under count four, and defense counsel considered the court's final response to be "perfect." The court's responses provide no basis for reversal.

The court instructed on the elements necessary to convict under count four using CALCRIM No. 2655, a lengthy instruction addressing numerous subsidiary issues, including causation. As given, CALCRIM No. 2655 required proof that "1. Curtis Madrigal . . . was a peace officer lawfully performing or attempting to perform his duties as a peace officer; [¶] 2. The defendant willfully resisted . . . Curtis Madrigal . . . in the performance of or the attempt to perform his duties; [¶] 3. When the defendant acted, he knew, or reasonably should have known, that . . . Curtis Madrigal . . . was a peace officer performing or attempting to perform his duties; [¶] 4. . . . Curtis Madrigal's . . . actions were reasonable, based on the facts or circumstances confronting him at the time; [¶] 5. The detention and arrest of the defendant were lawful and there was probable cause to detain; [¶] AND [¶] 6. The defendant's willful resistance caused serious bodily injury to . . . Curtis Madrigal." To prove that Madrigal's "serious bodily injury was caused by the defendant's willful resistance," the instruction continued, the People were required to prove that "1. A reasonable person in the defendant's position would have foreseen that his willful resistance could begin a chain of events likely to result in the officer's death or serious bodily injury; [¶] 2. Defendant's willful resistance was a direct and substantial factor in causing . . . Curtis Madrigal's . . . serious bodily injury; [¶] AND [¶] 3. . . Curtis Madrigal's . . . serious bodily injury would not have happened if the defendant had not

willfully resisted . . . Curtis Madrigal . . . from performing or attempting to perform his duties." The instruction continued: "A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that caused [the injury]."

While deliberating, the jury sent a note asking, "(1) Because the defendant did not direct the dog to bite[,] and the dog bite was accidental, could this be the fault of the dog handler? [¶] (2) Why was Deputy Thompson and/or K-9 Nash not mentioned in the resisting charges? [¶] (3) Who is responsible for the K-9's action?" In discussing with counsel how to respond, the court indicated it was inclined to refer the jury back to CALCRIM No. 2655 "[b]ecause obviously they're grappling with sort of the causation aspect of this." The court explained that the instruction "says a reasonable person in the defendant's position would have foreseen that his, her, willful resistance could begin a chain of events likely to result in the officer's death or serious bodily injury, and it's really for them to decide under these facts whether that was the case." After some additional discussion, with no significant objection,[4] the court responded to the questions as follows: "(1) Please review instruction #2655. 2. [¶] (2) This is not a matter for your determination. [¶] (3) Again, please see instruction 2655."

Later, the jury sent another note stating, "We are hung up on count 4." The court responded, "(1) Is there a particular issue concerning count 4 that I can assist you on?" The jury replied with three separate notes: The first asked: "If we believe the dog handler mishandled the dog, would that dismiss the greater charge on count 4 (Det. Madrigal)?" The second note read: "One juror believes that the officer's injury was indirect and not direct. Is 'direct' versus 'indirect' [to] be considered under the court's direction as a different standard?" The third note read: "One juror believes that it was not the defendant's resistance that caused serious bodily harm, but the officer's choice that

[4] Defense counsel asked that the court also refer to the lesser-included-offense instruction and to Deputy Thompson's testimony, but defendant does not now contend that the court erred in failing to do so.

caused serious bodily harm. Can this be considered or is [it] outside of the court's direction?"

The prosecutor asked to reopen argument, which the court did over defense counsel's objection. The prosecutor argued that, even if the jury found Officer Thompson's handling of Nash to be a cause that contributed to the injury, defendant's conduct was also a direct cause and a substantial factor. The prosecutor directed the jury's attention to "the bottom of [the] instruction, which [says that] I need to prove to you beyond a reasonable doubt that a reasonable person in defendant's position would have foreseen that his resistance here—the entire thing, the fleeing, the fighting, the not listening to instruction—would begin a chain of events likely to result in the serious bodily injury. And that that willful resistance was a direct and substantial factor in causing the injury." Defense counsel urged the jury, if it thought Thompson had mishandled the dog, to find defendant guilty on the lesser included offense of simple resistance (§ 148).

After the jury resumed deliberating, it sent out this final question: "According to the law, if an officer acted negligently or carelessly, which caused another officer injury, should that injury be blamed on the suspect at the scene? [¶] In other words, [the instruction] states that the People must prove that the defendant's willful resistance was a 'Direct' factor in the officer's injury. In the above scenario the negligent officer would be the direct cause and the suspect would be indirect. Looking for clarification on Direct or Indirect."

In the ensuing colloquy, defense counsel stated that he did not know "if there's an instruction discussing the supers[e]ding issue" and suggested that the court "direct [the jury] back to the instructions." The court drafted a proposed response: " 'Direct' does not mean the 'only' factor. There can be more than one direct factor, depending on your assessment of the evidence. It is up to you to decide whether a particular act was a direct or indirect factor." Defense counsel responded, "Perfect," the prosecutor said, "Sounds fine," and the court sent the response. The jury then found defendant guilty on count four.

Defendant now contends that the court erred because "the instruction given contained *no* reference to independent or superseding cause" and that it "should have instructed the jury to determine whether the dog handler's actions were foreseeable or were an independent intervening cause that broke the chain of causation."
This court explained the relevant principles of causation in *People v. Brady* (2005) 129 Cal.App.4th 1314 (*Brady*). "[A] defendant whose conduct was a proximate cause of harm is not absolved of responsibility because another person's conduct, negligent or otherwise, is also a substantial or contributing factor in causing the harm. The act of another constitutes a superseding cause precluding responsibility of the initial actor only if the other's conduct is both unforeseeable and causes harm that was not the foreseeable consequence of the initial actor's conduct." (*Id.* at p. 1328.) While in this case, as in *Brady*, "additional clarity might have been helpful" (*ibid.*), the instruction given and repeated by the prosecutor in the supplemental argument specified that defendant could be found guilty only if a reasonable person in defendant's position would have foreseen that his conduct could begin a chain of events likely to result in Madrigal's injury. The instructions to which the court referred the jury thus encompassed the foreseeability element required in *Brady* and, as in *Brady*, defendant did not propose any more expansive or clarifying instruction. To the contrary, defense counsel found the court's response to the jury's final inquiry to be "perfect." The court hardly "threw up its hands" in response to the jury's questions, as defendant suggests. The court directed the jury to a correct statement of the law and committed no error.[5]

---

[5] In *Brady*, this court observed that there was no CALJIC instruction on superseding cause, and that "a preferable formulation of the proximate cause instructions when an intervening cause is at issue is now found in the Judicial Council's California Civil Jury Instructions (2003) CACI Nos. 431 and 432." (*Brady, supra,* 129 Cal.App.4th at p. 1328.) Defendant made no request that the court give those instructions, possibly because CACI No. 432 places the burden of proof on the defendant to establish a superseding cause relieving him of responsibility for the harm. CALCRIM, which supplanted CALJIC as the recommended instructions for criminal cases shortly after *Brady* was published, also lacks an instruction defining superseding cause. CALCRIM No. 240, a general instruction on causation, alludes (albeit imperfectly) to the concept of

Defendant also contends that "it was inappropriate, and coercive to holdout jurors, to require the parties to present closing argument again after the court had already determined that the jury was wrestling with a legal question, not a factual one." However, rule 2.1036(b)(3) of the California Rules of Court provides that "[i]f the trial judge determines that further action might assist the jury in reaching a verdict, the judge may: [¶] . . . [¶] [p]ermit the attorneys to make additional closing arguments." Defendant is correct that in the two cases the court found approving the option of reopening argument, the arguments concerned factual issues. (*People v. Salazar* (2014) 227 Cal.App.4th 1078, 1084 [credibility of witness]); *People v. Young* (2007) 156 Cal.App.4th 1165, 1170 [" 'perception of the facts' "].) However, neither opinion suggests that the authority to reopen argument is limited to cases that involve jury impasse on issues of fact. Rule 2.1036 of the California Rules of Court draws no distinction between providing assistance to the jury to resolve factual or legal issues, and we see no reason why that distinction should make a difference. Both parties were given the opportunity to argue whether the evidence proved that defendant's conduct satisfied the elements in CALCRIM No. 2655. The court did not appear to endorse either conclusion and did not prejudice defendant by permitting supplemental argument. There was no violation of state or federal constitutional law.

3. *The court did not erroneously fail to instruct on self-defense*

Defendant contends that the court erred by failing to instruct that to establish the resisting-an-officer charges (counts three through nine), the prosecution was required to prove that defendant did not act in self-defense. He notes that CALCRIM No. 2655 lists an optional seventh element: "The defendant did not act (in self-defense . . .)." The bench

---

intervening cause by stating that "[a]n act causes [injury] if the [injury] is the direct, natural and probable consequence of the act" and that "[a] natural and probable consequence is one that a reasonable person would know is likely to happen *if nothing unusual intervenes*." (Italics added.) Although the prosecutor initially proposed that the court give CALCRIM No. 240, the instruction was withdrawn without objection at the instruction conference.

notes for that instruction state that the court has sua sponte duties (1) "to instruct on defendant's reliance on self-defense as it relates to the use of excessive force" (citing *People v. White* (1980) 101 Cal.App.3d 161, 167–168) and (2) "[i]f excessive force is an issue," to instruct that a defendant is not guilty if he "used reasonable force in response to excessive force" (citing *People v. Olguin* (1981) 119 Cal.App.3d 39, 46–47).

Here, the court adequately instructed on these issues. The instructions for counts three through nine each require proof that the officer was "lawfully performing or attempting to perform his duties as a peace officer." Each instruction states explicitly that a peace officer "is not lawfully performing his or her duties if he or she is . . . using unreasonable or excessive force in his or her duties," and then refers to CALCRIM No. 2670, captioned "Lawful Performance: Peace Officer," which repeats that "[a] peace officer is not lawfully performing his or her duties if he or she is . . . using unreasonable or excessive force." That instruction also states that "the People have the burden of proving beyond a reasonable doubt that the officer was lawfully performing his duties as a peace officer," and that, "[i]f the People have not met this burden, you must find the defendant not guilty of the particular charge" The instruction also states that, "[i]f a peace officer uses unreasonable or excessive force while arresting or attempting to arrest . . . a person, that person may lawfully use reasonable force to defend himself or herself."[6]

Defendant contends the jury "was not informed that if [he] acted with reasonable force, he was not guilty of the charges in counts three through nine." But the instructions state that a person subjected to excessive force in an arrest "may *lawfully* use reasonable force to defend himself" (italics added), which the jury could only have understood to mean that if defendant acted "lawfully," his conduct was not a crime. Moreover, the instructions did not permit the jury to convict on counts three through nine unless it found that the

[6] CALCRIM No. 2670 concludes: "A person being arrested uses reasonable force when he or she (1) uses that degree of force that he or she actually believes is reasonably necessary to protect himself or herself from the officer's use of unreasonable or excessive force; and (2) uses no more force than a reasonable person in the same situation would believe is necessary for his or her protection."

officers did *not* use excessive force. The instructions thus required the jury to find beyond reasonable doubt a fact negating the possibility that defendant acted in lawful self-defense.[7]

4. *Unlawful Driving*

Defendant argues that we must reduce to a misdemeanor his felony conviction on count 10 (taking or driving a vehicle without consent (Veh. Code, § 10851)) because the prosecution did not prove that the vehicle was worth more than $950. Under Proposition 47, any crime involving theft of property worth $950 or less must be charged and sentenced as a misdemeanor. (Pen. Code, § 490.2, added by Prop. 47, § 8.) This case was filed and tried after Proposition 47 took effect, but before the Supreme Court issued *People v. Page* (2017) 3 Cal.5th 1175. *Page* notes that Vehicle Code section 10851 can be violated either by conduct constituting theft—that is, taking a vehicle with intent to *permanently* deprive its owner of possession—or by nontheft conduct such as driving a vehicle after it has been stolen, or driving with intent to *temporarily* deprive the owner of possession (joyriding). (*Id.* at pp. 1182–1183.) *Page* held that one "who obtains a car valued at less than $950 *by theft* must be charged with petty theft and may not be charged as a felon under any other criminal provision." (*Id.* at p. 1183.)

The Attorney General concedes that the Vehicle Code section 10851 offense was tried and submitted to the jury on both theft and post-theft-driving theories;[8] that the

---

[7] The decisions cited in the Bench Notes to CALCRIM No. 2655 are not to the contrary. They address a problem arising from a prior set of standard instructions that did not state the principles quoted in the text above. In *People v. White*, *supra*, 101 Cal.App.3d 161, the trial court failed to instruct that an officer is not lawfully performing the officer's duty if the officer uses excessive force in making an arrest. (*Id.* at p. 166 & fn. 2.) In this case, the jury was told precisely that. The decision in *People v. Olguin*, *supra*, 119 Cal.App.3d 39, involved the same subsequently remedied gap in the standard instructions. (*Id.* at p. 44.)

[8] The instruction given here, CALCRIM No. 1820, requires the People to prove that defendant "took or drove someone else's vehicle without the owner's consent" while intending "to deprive the owner of possession or ownership of the vehicle for any period of time." The prosecutor's closing argument closely tracked the instructions and urged the jury to convict based on theft or post-theft driving.

prosecutor never proved the truck was worth more than $950; and that the verdict form did not require the jury to state whether it found defendant guilty based on theft or on post-theft driving. The court sentenced defendant to two years in prison on count ten, to run concurrently with his principal sentence.

The instructions thus allowed conviction on a valid or legally invalid theory. In such a case, prejudice is presumed unless the record shows the jury relied on the valid theory. The presumption is rebutted " 'if the jury verdict on other points effectively embraces [findings required to convict on the valid theory] or if it is impossible, upon the evidence, to have found what the verdict *did* find without finding [those facts] as well.' " (*People v. Chun* (2009) 45 Cal.4th 1172, 1204.) The Attorney General contends that the record satisfies the latter test because Officer Martinez testified that he saw defendant drive the truck on April 29; therefore, no juror could have found that defendant committed a theft of the truck on April 28 without also finding that he engaged in post-theft driving on April 29. While that contention is logically sound, the April 29 driving witnessed by Martinez was the same driving that underlay the conviction on count two, reckless driving with intent to evade police (Veh. Code, § 2800.2), for which the court sentenced defendant to eight months in prison.

Under Penal Code section 654, subdivision (a), defendant cannot be punished for violating both Vehicle Code sections 2800.2 and 10851 based on the same driving conduct; he may be punished only pursuant to the section that authorizes the longer prison term. A violation of Vehicle Code section 2800.2 is punishable by up to three years in state prison (see also Pen. Code, § 18, subd. (a); *People v. Butcher* (2016) 247 Cal.App.4th 310, 318–324), while a violation of Vehicle Code section 10851 is punishable, with exceptions not relevant here, by up to three years in county jail. (See also Pen. Code, § 1170, subd. (h)(1).) Thus, construing defendant's Vehicle Code section 10851 conviction as based on the post-theft driving witnessed by Officer Martinez, and thereby

upholding the felony conviction, requires that execution of the sentence for that offense be stayed pursuant to Penal Code section 654.[9]

Disposition

Defendant's sentence is modified to stay execution of the sentence imposed for count 10 pursuant to Penal Code section 654. In all other respects, the judgment is affirmed.

POLLAK, P. J.

WE CONCUR:

TUCHER, J.
BROWN, J.

[9] Defendant's reply brief raises a new issue, noting that the California Supreme Court ordered briefing in *People v. Bullard*, S239488, review granted February 22, 2017, on the issue of whether the equal protection clause or the doctrine of avoiding absurd results dictates that *any* violation of Vehicle Code section 10851 involving a vehicle worth less than $950 be sentenced as a misdemeanor, whether the offense involved theft or driving. Defendant thus argues that construing his count 10 conviction as a felony based on post-theft driving would deny him equal protection or yield an absurd result. We recently rejected that argument. (*People v. Morales* (2019) 33 Cal.App.5th 800, 806–809 [punishing unlawful driving more harshly than theft does not produce absurd results or deny equal protection], pet. for rev. pending.) Unless and until our Supreme Court rules otherwise, we adhere to that view.